No. 13800

In the United States Court of Appeals

For the Ninth Circuit

ROBERT DONALD ROWLAND,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Closing Brief of Appellant

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Closing Brief of Appellant

I.

THE DENIAL OF THE TOTAL CONSCIENTIOUS OBJECTOR STATUS AND THE DECISION TO CLASSIFY IN CLASS 1-A-O (MAKING APPELLANT LIABLE FOR NON-COMBATANT MILITARY SERVICE) WERE ARBITRARY, CAPRICIOUS AND WITHOUT BASIS IN FACT.

Appelle, arguing against appellant's above stated first point relies almost entirely on *Cox v. United States,* 332 U. S. 442.

Although appellant believes that the court is familiar with the full import of the *Cox* decision he makes

this comment: appellee overlooks that the Supreme Court unmistakably declared it to be the duty of the trial court to determine if a basis in fact existed for the final classification given; if no basis in fact existed it became the duty of the trial court to sustain a motion for a judgment of acquittal. When a trial court does not so find and the appellate court does so find then the trial court's judgment must be reversed.

Cox v. United States, 68 S. Ct. 115, 118;

Estep v. United States, 66 S. Ct. 423, 430;

Annett v. United States, ... F. 2d .....

10 C. A. Decided June 26, 1953, reversing *United States v. Annett,* 108 F. Supp. 400 because no basis in fact existed, appellant is informed by General Counsel for the Jehovah's Witnesses. Appellant promptly ordered a copy of the decision, from the Court of Appeals, and should have it for oral argument.

Neal v. United States, 203 F. 2d 111, 117;

United States v. Graham, 109 F. Supp. 377:

"Nothing appearing to contradict or impeach the verity of his claim . . . it is adjudged by this court that the classification of the defendant in 1-A is without any factual foundation." [378]

United States v. Kobil, unreported [U. S. D. Ct. E. D. Mich. #32,390 decided 9/13/51, Frank A. Picard, Judge]:

"I have searched this record. I have asked counsel to point out to me one thing that the

> board had before it besides its natural prejudices and its capacious manner—which I can understand, too, being of the type I am; it is very difficult for me to tell you what I think you ought to do and must do.
> "But it was absolutely without any basis in fact and there was no right for this draft board to classify him as 1-A. What they should have done, in my opinion, is to have made further inquiry that gave that right. There is nothing I have here to show and nothing they have that shows it if they did."

A recent decision holding that a classification contrary to all the evidence is illegal is that of Judge George B. Harris, in *United States v. Samuel Reuben Bippus,* No. 33399, Northern District of California, decided July 10, 1953. The full text is in Appendix A.

Appellee argues that the selective service system has the right to be "erroneous" and cites *Dickinson v. United States,* 203 F. 2d 336, in support. Appellant doesn't question the right of the selective service system to be "erroneous" but asserts that it can never be "illegal". A classification without basis in fact is illegal.

Dickinson does not and could not deprive an appellant of the opportunity to set up, as defenses, that he has been denied due process of law or that no basis in fact for the classification exists. Such defenses have been recognized ever since *Estep* and this doctrine was confirmed by *Cox.*

In *Dickinson* this court specifically found that a substantial basis existed for the classification. This is clearly shown on pages 343 and 344, where Dickinson's claim to a IV-D (minister's) classification, and on page 345 where his claim for a 1-O (full conscientious objector's) classification were both found to be vulnerable. If appellee had pointed out any such vulnerable spots in Rowland's selective service file, as challenged in Appellant's Opening Brief this case might be within *Dickinson*. None appearing it is within the allowable defenses authorized by *Estep* and *Cox* and a reversal is required.

Appellee closed his argument on this point with the bland statement:

> "A reading of the record in the instant case presents no circumstances which discloses any bias, prejudice or unreasonable conduct on the part of the Local Board in the classification of the appellant." [10]

Appellant makes no charges of bias or prejudice; he emphatically charges unreasonable conduct. He submits that a classification flying in the face of *all* the evidence is unreasonable because it is not based on fact.

It is noteworthy that appellee has made no attempt whatsoever to point out any pertinent evidence in the selective service file that can reasonably be said to be a "basis in fact" for the classification. In fact no evi-

dence whatsoever has been pointed out; none could have been pointed out because none exists.

When appellee, represented by experienced and learned counsel is unable to point to a single thing as a basis in fact for the classification it becomes crystal clear that the local board arbitrarily chose to compromise the claim of appellant with the board's duty to meet its quota of inductable youth. The compromise (1-A-O) was intended as a sop to the appellant and to procure an inductee for the board. The end result was unsatisfactory to both. If a basis in fact existed for the 1-A-O then prison is the correct solution; if none existed, as we submit is the truth then the district court's judgment should be reversed and the appellant be remanded to the now educated judgment of his local board until he becomes age 26.

II.

THE INDICTMENT IS FATALLY DEFECTIVE

Appellee's argument is that "(1) the essential elements of an offense against the United States are shown in the indictment, and (2) the appellant was not misled to his prejudice by the allegations of the indictment."

Appellant has never claimed he was misled but had based his complaint against the indictment on the point that no offense was charged, a point he argued fully in his Opening Brief.

III.

THE CLASSIFICATION OF APPELLANT WAS MADE AT AN ILLEGAL MEETING OF THE BOARD.

Appellee correctly argues that the regulations do not require ". . . the signature of the Board member present and voting on a classification to be placed on any of the records kept by the Local Board." [15]

If neither signatures nor the voting record had been entered in the Minutes of Actions by the Local Board and Appeal Board (Ex. p. 11) then, perhaps, the presumption of regularity would suffice to meet appellant's contention that the board meeting was illegal, although it still would seem that some record should be made to indicate the presence of a quorum and that all voted, and that the classification was by a majority vote, as required. However, that question is not present here because some of the board members *did* sign and a voting record *was* entered and on these revealing, because contradictory, facts appellant based his argument that the presumption of regularity was overcome and that further evidence, if any existed, concerning the regularity of the board meeting was required from the government.

In *Dickinson,* incidentally, the court restated an old rule evidence applicable here: ". . . if weaker and less satisfactory evidence is produced by one who might have furnished stronger and more satisfactory

proof that which he presents should be viewed with distrust." [344]

IV.

THE DEFENDANT WAS FRUSTRATED IN HIS ATTEMPT TO SECURE REVIEW AND WAS THEREBY DENIED DUE PROCESS.

Appellee contends "It cannot be said from the evidence elicited at the trial that the Local Board misled the appellant either intentionally or unintentionally in the prosecution of those 'rights'." [16]

Appellant believes that the clerk of the local board is the duly appointed and acting public contact for the board and that within the limits of the complained of action the board is bound by the callousness or stupidity of its clerk.

The timeliness of appellant's attempt to secure an appeal and a hearing before the board is of the utmost importance, of course. The timeliness of his attempt to secure a review is amply revealed by the record [R. 62] and appellant submits that the very portion quoted by appellee in his brief [17] is convincing in itself. Appellee did not seem concerned, at the time, that the testimony was either untruthful or not definite enough in fixing the time within the 10 day limitations of the regulations for no questions were asked of the witness after the judge's questions [R. 68] brought out the testimony fixing the time and that the witness be-

lieved his effort with the clerk was all the "appearance" and the "appeal" due him.

Appellant believes that the record amply shows first, that the local board clerk frustrated him and second, that he never intended to waive his right to whatever review was afforded.

Respectfully submitted,

J. B. TIETZ,
Attorney for Appellant.

Appendix

APPENDIX

(This is Judge Harris' decision referred to on page 3 herein.)

Friday, July 10, 1953

THE CLERK: The United States vs. Bippus.

MR. TIETZ: Ready for the defendant, Your Honor.

THE COURT: In the matter of Samuel Ruben Bippus, it appears that the defendant was classified 1-A by the local Draft Board and on appeal his classification sustained, after the plaintiff had been accorded a hearing by Mr. Ernest Williams. It further appears that the recommendation of both the hearing officer and the Director of Selective Service, who concurred in the classification of 1-0, were ignored by the Board. That is to say, both hearing officers and the Director of Selective Service apparently took the position that this man legitimately came within the purview of classification 1-0 providing for conscientious objectors.

The case is not without difficulty and I approach it with the natural timidity the Court has in setting aside a rule of a local Board. However, I am obliged under the circumstances and the facts as I see them to conclude that Samuel Bippus is a conscientious objector, within the authorities as I read them and within the contemplation of the rules.

The hearing before Mr. Williams discloses that the plaintiff had been a Jehovah's Witness for many years standing. His religious beliefs were so strong as to lead him to refuse to salute the Flag. His conduct resulted in his being suspended from at least two schools. Whether we regard the defendant as having fanatic zeal or with a devotion, may be ascribed. Nevertheless, his role appears to be that of a zealot within the accepted sense.

The record further reveals that the defendant served as a pioneeer in the category reserved for devoting practically full time to the ministerial work and received compensation from the witnesses themselves in the amount of $32.50 a month. The hearing officer, Mr. Williams, was apparently impressed by the sincerity and honesty and purpose of the plaintiff and apparently he believed that he voiced views of a true conscientious objector.

I feel that after such careful review by Mr. Williams, concurred in by the Director of Selective Service and in the light of observations made in this Court, that the defendant probably should have been classified as a conscientious objector and I find that the Government has failed to establish the guilt of the defendant to a moral certainty and beyond a reasonable doubt, in that the classification of 1-A made by the Draft Board and affirmed by the Appellate Board lacks evidence in its support.

Accordingly, this Court orders that the motion for a judgment of acquittal is hereby granted and the defendant is adjudicated not guilty.

MR. KARESH: I think Your Honor said the Director of Selective Service, but it should be the Department of Justice.

THE COURT: Yes, I did. The correction will be noted.

MR. TIETZ: May the bond be exonerated, Your Honor?

THE COURT: Yes.